7535-01-U

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 703

RIN 3133-AD27

Permissible Investments for Federal Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking.

SUMMARY: NCUA is proposing to amend its investment rules to allow federal credit unions to enter into investment repurchase transactions in which the instrument consists of first-lien mortgage notes. The proposed amendment establishes a credit concentration limit, minimum credit rating, requirement for an independent assessment of market value, a maximum term, and custodial requirements for the transactions.

DATES: Comments must be received on or before September 25, 2006.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.
- E-mail: Address to regcomments@ncua.gov. Include "[Your name] Comments on Parts 703 and 704 Permissible Investments for Federal Credit Unions" in the e-mail subject line.
- Fax: (703) 518-6319. Use the subject line described above for e-mail.
- Mail: Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

PUBLIC INSPECTION: All public comments are available on the agency's website at http://www.ncua.gov/RegulationsOpinionsLaws/comments as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518-6540 or send an e-mail to OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT:

Technical Information: Jeremy Taylor, Senior Investments Officer, Office of Capital Markets and Planning, at the above address or telephone: (703) 518-6620.

Legal Information: Moisette Green, Staff Attorney, Office of General Counsel, at the above address or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

NCUA is proposing to amend its investment rules in Part 703 to permit federal credit unions (FCUs) to engage in investment repurchase transactions where the instruments purchased under an agreement to resell are mortgage notes, evidenced by participation certificates or trust receipts. Investment repurchase transactions are permissible investment activities for FCUs so long as any securities an FCU receives are permissible investments. 12 CFR 703.13(c)(1). Part 703, however, specifically excludes the purchase of real estate secured loans from its coverage, stating these purchases are governed by the eligible obligations rule. 12 CFR 701.23, 703.1(b)(2).

The Federal Credit Union Act (Act) authorizes FCUs to invest in certain mortgage-backed and mortgage-related securities. 12 U.S.C. 1757(15). For purposes of this rule, mortgage notes are transactions involving offers or sales of promissory notes secured by a first lien on a single parcel of improved real estate and participation interests in those notes originated by a financial institution that is examined and supervised by a federal or state authority or a mortgagee approved by the Department of Housing and Urban Development (HUD). 12 U.S.C. 1757(15)(A); 15 U.S.C. 77d(5). NCUA recognizes that FCU authority under §107(15) of the Act is not limited to member notes, but has limited the exercise of this authority by regulation. See 12 CFR 701.23; 53 FR 4843 (February 18, 1988).

The Secondary Mortgage Market Enhancement Act of 1984 (SMMEA) amended the powers of federally chartered financial institutions and preempted state law to authorize investments in mortgage-backed securities. Pub. Law 98-440, 98 Stat. 1689 (1984). In 1984, Congress was concerned that traditional mortgage lenders were less willing or able to hold long-term, fixed rate mortgages in an environment of inflationary and interest rate pressures and failing thrifts. S. Rep. 98-293 (1983). Federal and state statutes, however, restricted financial institutions from trading and investing in private mortgage-related securities. For that reason, Congress liberalized those statutory restrictions, except for limitations imposed by federal regulators, to increase the flow of funds for housing by facilitating the private sector's participation in the secondary market for mortgages. S. Rep. 98-293 (1983); H. Rep. 98-994 (1983).

SMMEA amended the Act to permit FCUs to invest in certain mortgages and privately issued mortgage-related securities. Specifically, SMMEA added §107(15)(A) to the Act, permitting FCUs to invest in securities that are offered and sold pursuant to section 4(5) of the Securities Act of 1933. [1] 12 U.S.C. §1757(15); 15 U.S.C. 77d(5).

FCU authority under §107(15) is not specifically limited to member notes, but NCUA has continuing concerns about the breadth of the authority. An interpretation that is not limited to member loans would materially alter the nature of FCU asset powers and could authorize loans to nonmembers. Accordingly, the Board has limited the authority in §107(15)(A) by regulation. Under the eligible obligations rule, an FCU may purchase only the mortgage notes of its members or those needed to complete a pool of loans to be sold on the secondary market. 12 CFR 701.23. NCUA is proposing to expand its policy by permitting FCUs to purchase mortgage notes, pursuant to §107(15)(A) of the Act, which will be sold back to the seller for settlement within 30 days.

[1] Securities under section 4(5) of the Securities Act of 1933 are transactions involving offers or sales of promissory notes secured by a first lien on a single parcel of improved real estate and participation interests in those notes originated by a financial institution that is examined and supervised by a federal or state authority or a mortgagee approved by the Department of Housing and Urban Development (HUD). 12 U.S.C. §77d(5)(A). Transactions involving securities originated by federal or state-regulated financial institutions must be offered and sold at a minimum aggregate sales price per purchaser not less than $250,000, paid in cash within 60 days of the sale, and bought for the purchaser's account only. Transactions between federal or state-regulated financial institutions or HUD-approved mortgagees must also meet these conditions of sale.

II. The Proposed Rule

NCUA is proposing to permit the purchase of mortgage notes including those involving non-members, but only when the purchases are a part of an investment repurchase transaction. The Board recognizes the proposed amendment alters its earlier approach limiting the purchase of nonmember loans to those needed to complete a pool for sale on the secondary market. When NCUA implemented SMMEA in 1988, investment repurchase transactions were not prevalent in the home loan market. As the way housing is financed has evolved and the demand for housing increased, new methods to provide housing credit have developed. The Board believes broadening FCU authority to invest in mortgage notes furthers the secondary market and purposes of SMMEA.

Investment repurchase transactions using mortgage loans typically involve mortgages that are in the process of securitization, and NCUA believes permitting FCUs to engage in these transactions furthers the purposes of SMMEA by funding third party mortgage warehouses. By mortgage warehouse, NCUA means the process of holding mortgage loans for a short time from origination to securitization before sale of the loans on the secondary market. Mortgage note repurchase transactions involve, first, the purchase of a mortgage note or pool of notes. The mortgage loans underlying the note are not limited to loans made to credit union members. The second step in the transaction is the resale of the mortgage note or notes back to the counterparty. The mortgage note will take the form either of a trust receipt[2] or a participation certificate[3]. The Board believes this second sale addresses the concern that the investment circumvents field of membership restrictions by requiring, as part of the transaction, that FCUs sell the mortgage note within a reasonably short period and will not continue to hold the underlying loans. This approach is substantially analogous to the current regulatory approach in the eligible obligations rule that permits FCUs to purchase nonmember mortgage loans to complete a pool for sale to the secondary market. 12 CFR 701.23(b)(1)(iv).

This proposal to amend §703.14 to permit investment repurchase transactions using mortgage notes has six conditions. The six conditions address NCUA's safety and soundness concerns and include a credit concentration limit, minimum credit rating, independent assessment of market value, maximum term of the repurchase transaction, custodial requirements for the transactions, and undivided interests in mortgage notes. The proposed rule would limit aggregate investments in mortgage note repurchase transactions to 25% of an FCU's net worth with any one counterparty and to 100% of its net worth with all

[2] A "trust receipt" is a receipt issued by a custodian bank to the Seller, evidencing that the Seller is the registered owner of a 100% undivided participation ownership interest in certain mortgage loans with attached endorsement issued in blank executed by the Seller.

[3] A "participation certificate" is a certificate issued to the Seller, evidencing that the Seller is the registered owner of a 100% undivided participation ownership interest in certain mortgage loans with attached assignment in blank executed by the Seller.

counterparties.[4] The counterparty in a mortgage note repurchase transaction could not have any outstanding debt with a long-term rating lower than A- or its equivalent or a short-term rating lower than A-1 or its equivalent at the time of a repurchase transaction. An FCU would have to use an independent, qualified agent to obtain an assessment of market value when complying with the requirement to receive a daily assessment of the market value of the repurchase securities. The maximum term of a mortgage note repurchase transaction would be limited to 30 days. Additionally, mortgage note repurchase transactions would be conducted using tri-party custodial agreements. Undivided interests in mortgage notes would be required.

The proposed amendment to §703.14, permissible investments, would operate in conjunction with §703.13(c), permissible investment activities. The amendment to §703.14 creates additional requirements for investment repurchase transactions when mortgage notes are the underlying instruments. For instance, an FCU must obtain the daily assessment required under §703.13(c)(1) from an "independent qualified agent," defined as an agent independent of an investment repurchase counterparty that does not receive a transaction fee from the counterparty and has at least two years experience assessing the value of loans.

[4] The proposed 25% concentration limit is similar to the limit governing a national bank's investment in a mortgage note repurchase transaction. A national bank's mortgage note repurchase transaction is treated as a loan and is limited to 15% of capital, unless the bank can demonstrate the mortgage note is readily marketable collateral, in which case an additional extension is permitted, limited to 10% of capital. *See* 12 U.S.C. 84(a)(2), (c)(4); 12 CFR 32.2(k)(1)(iii), (n), and 32.3. An FCU's lending limit to one member is 10% of shares plus post-closing, undivided earnings. 12 U.S.C. 1757(5)(A)(x); 12 CFR 700.2(j), 701.21(c)(5). The proposed 25% concentration limit is modeled after the limit governing a national bank's investment in asset-backed securities, which is 25% of a bank's capital and surplus. 12 CFR 1.3(f).

Additionally, all the requirements of §703.13(c) would apply to the amendments to §703.14. In other words, FCUs investing in mortgage note repurchase transactions must maintain adequate margins that reflect a risk assessment of the mortgage notes and the term of the transactions pursuant to §703.13(c)(1). Further, under §703.3,, federal credit unions must establish an investment policy that includes the characteristics of investments the FCU may make, a risk management plan, a description of who has investment authority and the extent of that authority, and other investment management information. FCUs must ensure those with investment authority are qualified by education or experience to assess the risk characteristics of investments and investment transactions.

NCUA requests comments on the conditions for FCU participation in the market for mortgage note repurchase transactions. NCUA also requests commenters address the specific questions below:

1. By what means can the party investing in mortgage note repurchase agreements easily identify the underlying loans, and is it necessary to require more than a tri-party custodial arrangement to accomplish this? If so what additional requirements should be identified?
2. What minimum underwriting criteria, if any, should the rule address?
3. What requirements, if any, should the rule address regarding the quality of the mortgage notes and their monitoring?
4. The proposed minimum long-term credit rating for the counterparty is higher than has been previously included in Part 703 for municipal

securities. Given that the mortgage note repurchase transactions are typically short term, should the agency consider excluding long-term credit requirements for counterparties in mortgage note repurchase transactions?

By permitting FCUs to invest in mortgage loans as a part of a repurchase transaction, NCUA is not permitting FCUs to purchase first lien mortgage loans to nonmembers. Mortgage note repurchase transactions involve loans granted and serviced by a third party that agrees to repurchase the securities at a set price at the end of a specific term. NCUA continues to believe that permitting FCUs to buy nonmember mortgage notes outright is inconsistent with the purposes of the Act. Additionally, the purchase of nonmember mortgage loans presents a greater credit risk as an investment because mortgage notes do not need to be rated, and NCUA could not set standards to manage the risks of these investments effectively. NCUA believes, however, FCUs can safely manage repurchase transactions. Requirements are presented in the rule to address safety and soundness concerns relating to mortgage note repurchase transactions. NCUA requests comments on the effect permitting investment repurchase transactions using mortgage notes may have on the safety and soundness of FCUs, the feasibility of the proposed standards for risk management, and the ability of FCUs to manage these investments safely.

III. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities, those credit unions with less than ten million dollars in assets. The proposed rule involves the permissibility of certain investment repurchase transactions for FCUs and is grounded in NCUA concerns about the safety and soundness of the transactions and their potential effects on FCUs and the National Credit Union Share Insurance Fund. Accordingly, the Board has determined and certifies that this proposed rule does not have a significant economic impact on a substantial number of small credit unions and that a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined that this rule will not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999--Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule will not affect family well-being within the meaning of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed rule is understandable and minimally intrusive.

List of Subjects in 12 CFR part 703

Credit unions, Investments, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on July 20, 2006.

Mary F. Rupp

Secretary of the Board

For the reasons set forth in the preamble, the Board amends 12 CFR part 703 as set forth below:

PART 703—INVESTMENT AND DEPOSIT ACTIVITIES

1. The authority citation for part 703 is continues to read:

Authority: 12 U.S.C. 1757(7), 1757(8), 1757(15).

2. Amend §703.1 by revising paragraph (b)(2) to read as follows:

§703.1 Purpose and scope.

* * * * *

(b) * * *

(2) The purchase of real estate-secured loans pursuant to Section 107(15)(A) of the Act, which is governed by §701.23 of this chapter, except those real estate-secured loans purchased as a part of an investment repurchase transaction, which is governed by §§703.13 and 703.14 of this chapter;

* * * * *

3. Amend §703.2 by inserting the definition of “independent qualified agent” alphabetically between the definitions of “immediate family member” and “industry-recognized information provider” to read as follows:

§703.2 Definitions.

* * * * *

Independent qualified agent means an agent independent of an investment repurchase counterparty that does not receive a transaction fee from the counterparty and has at least two years experience assessing the value of loans.

* * * * *

4. Amend §703.14 by inserting new paragraph (h) to read as follows:

§703.14 Permissible investments.

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(h) Mortgage note repurchase transactions. A federal credit union may invest in securities that are offered and sold pursuant to section 4(5) of the Securities Act of 1933, 15 U.S.C. 77d(5), only as a part of an investment repurchase agreement under §703.13(c), subject to the following conditions:

(1) The aggregate of the investments with any one counterparty is limited to 25 percent of the credit union's net worth and 100 percent of its net worth with all counterparties;

(2) At the time a federal credit union purchases the securities, the counterparty cannot have debt with a long-term rating lower than A- or its equivalent, or a short-term rating lower than A-1 or its equivalent;

(3) The federal credit union must obtain a daily assessment of the market value of the securities under §703.13(c)(1) using an independent qualified agent;

(4) The mortgage note repurchase transaction is limited to a maximum term of 30 days;

(5) All mortgage note repurchase transactions will be conducted under tri-party custodial agreements; and

(6) A federal credit union must obtain an undivided interest in the securities.